No. 12337.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, THE CITY OF LOS ANGELES, a municipal corporation,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Appellee.

APPELLEE'S REPLY BRIEF.

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Basic Question Presented on This Appeal.

Where a price adjustment clause contained in a contract for the manufacture and sale of electrical power cable, composed principally of copper and lead (and containing no other metals), provides for an adjustment of the price based on United States Labor Bureau data, did the trial court properly determine that changes in the prices of lead and copper were to be referred to, rather than to changes in the average index figures of 141 commodities included under a heading Metal and Metal Products, where a reference to lead and copper renders the price adjustment clause fair, just and reasonable while a reference to Metal and Metal Products as a group would render the contract unreasonable, inaccurate, speculative and unfair?

I.
STATEMENT OF PLEADINGS.

The Complaint.

Appellee (plaintiff below) The Okonite-Callender Cable Company, Incorporated, filed its Complaint against Appellants, Department of Water and Power of the City of Los Angeles and the City of Los Angeles (defendants below) for money due on a contract for the manufacture and sale of six items of power cable, the principal components of which were copper and lead.

After alleging the jurisdictional requirements as to diversity and amount, the items of cable involved in the contract and the price for the separate items, the Complaint referred to the price adjustment clause contained in the contract and to the United States Department of Labor monthly compilations of wholesale prices referred to in the price adjustment clause. The Complaint in Paragraph IX thereof [T. of R. p. 5] (a short paragraph of seventeen lines in the Transcript of Record) alleged that during the period of said contract and before completion thereof increases occurred in the cost of labor and materials; that the two principal materials used in the manufacture of said cable were copper and lead and that the average increase in the monthly index figures referred to in said contract and compiled by the United States Department of Labor for copper and lead for the period in question were as therein set out. It was thereafter alleged that plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price because of the materials used in said cable [Par. X of the Complaint; T. of R. p. 6]. That prior

to the commencement of the action plaintiff filed a claim as required by law against the defendants; that defendants allowed said claim in part only; that plaintiff had duly performed all of the terms and conditions of said contract on its part to be performed [T. of R. p. 7]; that said partial allowance constituted a part only of the increased contract price occasioned by the increase of the cost of copper and lead used in the manufacture of said cable, as evidenced by the Department of Labor Index [Par. XIII of the Complaint; T. of R. p. 7]. That pursuant to the price adjustment clause in said contract, plaintiff, after allowing a credit for the amounts paid by the defendants, was entitled to recover the sum of $9,-996.90 with interest thereon at the rate of 7% per annum from the 1st day of March, 1947, until paid [Par. XIV of said Complaint; T. of R. pp. 7-8]. The Complaint consisting of seven pages is set out in the Transcript of Record, pages 2-8, inclusive.

The Answer.

The Answer [T. of R. pp. 9-25, incl.] refers to the same six items of cable covered by the contract and the contract price per item and in addition to the allegations in the Complaint the Answer sets out in tabulated form the beginning and completion dates. Paragraph III of the Answer [T. of R. p. 11] sets out in quotation marks the price adjustment clause contained in the contract. After the introductory paragraph the clause first deals with the adjustment of the contract price upwards or downwards for changes in labor costs, stating that "for the purpose of adjustment the proportion of the contract price is accepted as 20%." The second portion of the price adjust-

ment clause deals with material and states that "for the purpose of adjustment the proportion of the contract price representing material is accepted as 50%" [T. of R. p. 12]. Clause (b) dealing with the adjustment in the material costs gave rise to the only controversy in the Court below. (This clause will be quoted and discussed under the Argument Section of this brief.)

Paragraph IV of the Answer [T. of R. pp. 15-18, incl.] purporting to be an answer to Paragraph IX of the Complaint hereinbefore referred to contains throughout the phrase "that the defendants admit and allege." A careful examination of this paragraph of the Answer shows that everything in Paragraph IX of plaintiff's Complaint is admitted but much additional detailed matter is alleged in said Paragraph IV of the Answer. For example, the defendants admit that lead and copper constitute a large proportion of the material used in the manufacture of said cable [T. of R. p. 15, at bottom of page]. The Answer then refers to the various groups of materials contained in the Bureau of Labor publication and while plaintiff's Complaint did not refer to "Metal and Metal Products" or the particular commodities included thereunder either in Paragraph IX or elsewhere in the Complaint, the Answer alleges that Metal and Metal Products is the sixth group of index numbers of wholesale prices, and thereafter defendants "admit and allege" that there are sixteen commodities listed under Metal and Metal Products including Copper, Electrolytic, delivered Connecticut Valley, and Lead, Pig, Desilverized, f. o. b. New York [T. of R. bottom of page 16, top of page 17]. The defendants then "admit and allege" that for the period from April, 1946, to March of 1947, inclusive, the United States

Department of Labor, Bureau of Labor Statistics, published the index numbers of the wholesale prices of "Copper, Electrolytic, delivered Connecticut Valley," and "Lead, Pig, Desilverized, f. o. b. New York, as hereinafter set forth under Columns 1, 2 and 3, respectively." That the sum of two index numbers for each of said months, respectively, is the amount hereinafter set forth under Column 4. That the average amount of the two index figures for the period from the base month of April, 1946, to and including each of the several months specified in the contract for final shipment and the increase of said average amounts of said base month and the respective percentage of increase of each of said average figures over said base month are set forth under Columns 5, 6 and 7.

Thereafter in tabulated form the Answer sets forth under seven numbered columns (1) the month; (2) the index number of copper for each of said months; (3) the index number of lead for each of said months; (4) the total horizontally of Columns 2 and 3; (5) the average for each of the three delivery periods; (6) the increase in points for the delivery periods; and (7) the percentage of increase. It is to be noted that the figures set forth under Columns 6 and 7 [T. of R. p. 18] are identical with the figures set forth in Paragraph IX of plaintiff's Complaint [T. of R. p. 6]. Thereafter the Answer admits that the plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price.

The Answer then refers to the claim filed by the plaintiff prior to the commencement of suit, the amount allowed by the defendants and the balance rejected "without prejudice" either to plaintiff or to the defendants and admits that plaintiff has duly performed all of the conditions of said contract on its part to be performed. The Answer then alleges that defendants have paid all that is due and owing [T. of R. pp. 19-20].

The Answer [T. of R. pp. 22-23] then sets forth in tabulated form index numbers taken from the Metal and Metal Products group for the months in question stating the average increase and the percentage increase. We call the Court's attention to the fact that this tabulation is in the same general form as set out in the Answer covering lead and copper [T. of R. p. 18] the difference being that since the tabulation on page 18 covers copper and lead the *defendants have averaged* copper and lead and thus obtained the percentages of increase claimed in plaintiff's Complaint. Finally the Answer sets out in tabulated form the method of translating the percentage increases into dollars under the defendants' theory of the proper method of computation. Defendants allege that no additional money is due or unpaid.

The Answer set up no affirmative defenses but, as seen, went far beyond mere admissions and denials of the plaintiff's Complaint and set forth the exact alternative method of computation to be adopted by the Court depending upon whether the Court adopted plaintiff's construction of the price adjustment clause or defendants' construction.

II.
STATEMENT OF THE CASE.

Appellants' statement of the case (App. Op. Br. pp. 2-5, incl.), as to factual statements, appears to be correct so far as it goes. We wish to make certain additional statements, however, which have a bearing upon certain points advanced for the first time on this appeal by Appellants in seeking a reversal of the Findings and Judgment below. Appellee (plaintiff below) pursuant to local Federal Rule 12 filed with the Court a written pre-trial Memorandum of Points and Authorities [T. of R. pp. 26-66]. Defendants likewise simultaneously filed a Memorandum prior to trial [T. of R. pp. 67-75]. Plaintiff's pre-trial memorandum after referring to the action and the amount sought to be recovered, stated:

> "The only issue between the plaintiff and the defendants is as to the correct interpretation of the price adjustment clause as applied to certain monthly statistical information published by the United States Department of Labor. There is no controversy as to the publications themselves. The issue is a narrow one and resolves itself into which set of data contained in the Bureau of Labor publications is to be used in computing the increased price of materials under the price adjustment clause of the contract." [T. of R. p. 27.]

Immediately following the foregoing statement, plaintiff's pre-trial memorandum contained the following statement:

> "The defendants agree with the plaintiff that if plaintiff's construction of the escalator clause as applied to the Bureau of Labor Statistics is correct, that plaintiff is entitled to recover the sum of $9,996.69 with interest. (Only 21¢ less than plaintiff

> claims in its Complaint, which slight amount plaintiff is, of course, willing to waive.) Plaintiff and defendants are likewise in agreement that if defendants' construction of the price adjustment clause as applied to the monthly Bureau of Labor data is correct, that plaintiff is not entitled to recover in any amount whatsoever." [T. of R. p. 27.]

See also similar statement in plaintiff's pre-trial memorandum [T. of R. p. 43].

Plaintiff's pre-trial memorandum dealt in considerable detail with an explanation of the Bureau of Labor Statistics [T. of R. pp. 36 to 45] in an effort to explain to the trial court the statistics in question, the individual commodities, 141 in number, including lead and copper which were listed under the group of Metal and Metal Products.

Plaintiff's pre-trial memorandum then presented plaintiff's argument and authorities.

Defendants' memorandum prior to trial [T. of R. pp. 67-75] is prefaced by a statement of facts wherein it is stated:

> "Issue is joined on the proper interpretation of the contract provisions regarding the adjustment in the contract price for increases in material costs." [T. of R. p. 68.]

Defendants' Points and Authorities are set out in its memorandum prior to trial [T. of R. pp. 72-75].

After the trial of the case, the learned trial Judge, the Honorable Leon R. Yankwich, filed a decision ordering judgment for the amount prayed for $9,996.69 with interest at 7% from March 1, 1947. The deduction of 21¢

which plaintiff was willing to waive arose because defendants' accountants in computing the increased cost differed by that amount from plaintiff's computation and the amount prayed for in the Complaint. The informal decision of the Court, the comments with respect thereto and the instructions that plaintiff prepare Findings and Judgment in conformity with local Rule 7 appears in T. of R. pages 76-78.

Detailed Findings of Fact, Conclusions of Law and Judgment will be found in the T. of R. pages 78-96. In Finding No. 6 [T. of R. p. 82] the Court found:

> "The controversy herein relates only to the price adjustment clause dealing with the increased costs of materials used by plaintiff in the manufacture of said cable."

The Findings set out in full the price adjustment clause [T. of R. pp. 83-87]. The Court found that the Bureau of Labor Statistics introduced in evidence were the ones referred to in said contract and that a publication known as the "Labor Review" containing many written articles and a month later reprint of certain group index numbers, including Metal and Metal Products, was not the publication intended to be referred to by the price adjustment clause. The findings further state

> "the parties plainly intended to disregard all non-metallic components contained in said cable. The sole metallic components of said cable are lead and copper and the Court finds that whenever said price

adjustment clause in said contract refers to 'material' or 'increases in material costs' or 'decreases in material costs' or similar words or phrases, the word 'material' or 'materials' refers to copper, electrolytic, delivered Connecticut Valley, and lead, pig, desilverized, f. o. b. New York, which are the principal component parts of the cable referred to in said contract." [T. of R. p. 91.]

The Court likewise found that the excess costs of said materials to the plaintiff "was substantially more than the amount which plaintiff seeks to recover herein by virtue of said price adjustment clause" [T. of R. p. 88]. The Court found that the construction of the price adjustment clause of said contract contended for by defendants "would render such price adjustment clause unfair, unreasonable, inaccurate and speculative." On the other hand, that the construction of the price adjustment clause contended for by the plaintiff and found by the Court to be the correct construction "renders said clause reasonable, fair and definite and is the only construction which the parties as reasonable business men could have had in contemplation at the time when said contract was entered into" [T. of R. p. 93]. And, finally, that any allegations in the Answer in conflict with the Findings of the Court were not true or correct [T. of R. p. 93].

Conclusions of Law follow, again stating the amount of the judgment as $9,996.69 with interest at 7% from May 1, 1947, to the date of judgment. The Judgment is set out in the Transcript of Record at page 95. Pur-

suant to the Findings, interest in the amount of $1,306.21 was added to the principal amount of $9,996.69.

After plaintiff's proposed Findings of Fact, Conclusions of Law and Judgment were served upon the defendants, defendants filed elaborate objections in great detail to the proposed Findings and Judgment. Said objections to plaintiff's proposed Findings of Fact and Conclusions of Law were, Appellee believes, the only documents filed with the trial court which the Appellants expressly excluded from the official certified record [See Appellants' designation of record on appeal, T. of R. p. 100 and top of p. 101]. Consequently, said objections to plaintiff's proposed Findings of Fact and Conclusions of Law do not, Appellee assumes, appear even in the certified official transcript and, of course, are not printed in the transcript of record.

After the entry of the Judgment on March 15, 1949 [T. of R. p. 98] the defendants moved for a new trial, to set aside Findings of Fact, Conclusions of Law and to vacate and set aside the Judgment, all of which motions were denied.

III.

SUMMARY OF ARGUMENT.

The subject matter of the contract, electrical cable, is composed chiefly of copper and lead, its only metallic components. The wording of the price adjustment clause itself, giving consideration to all of its terms including the phrase "increases in material costs" and similar phrases clearly referring to lead and copper requires that reference be made to the changes in the prices of copper and lead as disclosed by the Bureau of Labor Statistics referred to in the clause.

The testimony of Appellants' own chief witness clearly discloses that the price adjustment clause was intended to take care of increases or decreases in the cost of the materials used in the manufacture of the cable.

The data with respect to lead and copper are contained in the Bureau of Labor price publications and accurately represent the increases in material costs to the manufacturer. The average change in the group of Metal and Metal Products as a whole, consisting of approximately 140 separate commodities, completely fails to represent such increase.

It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted.

While the Findings of the trial court are not *per se* binding upon the Appellate Court, they are presumptively

correct and will not be disturbed unless this Court is satisfied that they are clearly erroneous and "inconsistent with substantial justice."

The testimony of Mr. Metz, a witness for Appellee, was material and relevant and properly admitted by the Court.

Interest was properly allowed covering the period when payments became due until the entry of judgment. The Department of Water and Power of the City of Los Angeles was acting in a private or proprietary capacity and its obligations are identical to those of a private corporation.

ARGUMENT.

IV.

THE CONSTRUCTION PLACED UPON THE PRICE ADJUSTMENT CLAUSE BY THE TRIAL COURT IS THE ONLY CONSTRUCTION PERMISSIBLE IN VIEW OF (1) THE SUBJECT MATTER OF THE CONTRACT; (2) THE TERMS AND PROVISIONS OF THE PRICE ADJUSTMENT CLAUSE; (3) THE UNITED STATES DEPARTMENT OF LABOR DATA REFERRED TO UNDER THE PRICE ADJUSTMENT CLAUSE; (4) THE TESTIMONY OF APPELLANTS' OWN CHIEF WITNESS RELATING TO THE PURPOSE SOUGHT TO BE ACCOMPLISHED BY THE PRICE ADJUSTMENT CLAUSE.

1. The Subject Matter of the Contract.

As disclosed by the pleadings, the contract covering six items of electrical power cable was awarded Appellee pursuant to Appellants' request for bids. Typical samples of the identical six types of cable are before this Court as exhibits in the case. An examination of these samples shows that the cable consists of an outer sheathing of lead with an inner core of copper wires formed into copper cables of different sizes and dimensions in the different cables. Some insulating material consisting of paper and oil as required by the contract specifications are the only other materials in the cable. The Complaint alleged that the two principal materials used in the manufacture of said cable were copper and lead [Plaintiff's Complaint; T. of R. p. 5, bottom of page]. Defendants' Answer to this allegation was "defendants admit that lead and copper constitute a large proportion of the ma-

terials used in the manufacture of said cable" [T. of R. bottom of p. 15]. Plaintiff's witness, Mr. Metz, testified that the cost of copper and lead was 90 per cent of the cost of all material used in the cable [T. of R. p. 110]. Subsequent testimony discloses that in giving this percentage he was referring to the average of all six different items in the cable. Appellants' (defendants below) witness, Boris A. Gray, gave the cost percentage as varying from 84.67% to 97.10% with a general average of all as 91.33% [T. of R. p. 147]. The Court in its Memorandum Decision mentions 90% as to this cost and the formal Findings state: "That the cost of the lead and copper used in the manufacture of all said items of cable as a group amounted to slightly in excess of ninety per cent (90%) of the total cost of all material used in said cable" [T. of R. p. 88].

The Court found that the parties intended to disregard the insulating material in the cable since no such commodity was included under the Bureau of Labor publications dealing with Metal and Metal Products. Mr. Metz, plaintiff's witness, testified that copper, Commodity Code No. 472.1, and lead, Commodity Code No. 473, in the Bureau of Labor Statistics, met and complied with the specifications of the contract. Thus at the outset we have the subject matter of the contract composed chiefly of lead and copper and we find that lead and copper meeting the specifications of the contract are among the commodities under Metal and Metal Products and that their monthly prices are given and that index numbers with respect to such commodities are available, all as admitted and set forth in Appellants' Answer [T. of R. p. 18]. In view of these circumstances it would be unusual, to

say the least, that the parties should provide under a price adjustment clause that increased or decreased material costs would be measured by taking the average increases or decreases of the entire group of Metal and Metal Products. Metal and Metal Products contain approximately 141 separate commodities, 111 of which are strictly manufactured articles, including such commodities as all types of farm machinery and equipment (even including windmills), automobiles and trucks; fabricated and unfabricated articles of iron and steel; plumbing material and fixtures, including vitreous china articles and all those various types of commodities which are listed under Metal and Metal Products in the United States Bureau of Labor publications.

Moreover, to refer to Metal and Metal Products as a group would clearly make the contract speculative and entirely unreasonable. Thus the prices of the actual component materials (lead and copper) might well have decreased (as did quicksilver, for example) despite the fact that Metal and Metal Products *as a group* increased. Under such circumstances, the application of Appellants' theory would achieve the absurd result that despite the fact that the manufacturer's material costs had decreased, the purchaser (Appellants) would be required to pay large additional amounts merely because of the increase in the Metal and Metal Products group as a whole. This was undoubtedly what the trial court referred to in its comments in its Memorandum Decision when he said that to make the price dependent upon the average of some 140 commodities listed by the Department of Labor would be unrealistic and that the only reasonable interpretation of the clause is one which would make the price

adjustment dependent upon the cost of the component *materials* of the cable as found in Metal and Metal Products [See T. of R. p. 76 where the exact comments of the learned trial judge are given]. As was noted by one of plaintiff's counsel on seeing samples of this cable: "I am unable to see any automobiles, windmills or bathtubs in this cable." Yet Appellants' theory would require that fluctuations in just such items would control the price adjustment clause now before this Court.

2. The Terms and Provisions of the Price Adjustment Clause.

For the convenience of the Court we quote the introductory provisions of the price adjustment clause and immediately thereafter the portion of the price adjustment clause dealing with materials (emphasis added):

> "1.3 Price Adjustment Clause: The contract price shall be subject to adjustment for *changes in labor and/or material costs,* such adjustments to be determined in accordance with the following method, provided however, that the price shall not be increased by virtue of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942. * * *
>
> "2. Material:
>
> "a. For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.
>
> "b. The above amount accepted as representing *material* will be adjusted for *increases in material costs,* such adjustment to be based on the index of *wholesale prices* for 'Group VI—Metals and Metal

> Products' compiled monthly by the U. S. Department of Labor. The average of the monthly *material index figures* for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly *material index figure* with the *material index figure* for the Base Month. The adjustment for increases in *material* will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing *material,* as indicated above, and the result will be accepted as an increase in the contract price." (Emphasis added.) [T. of R. pp. 83-84-85-86.]

We have emphasized certain words and phrases in these two clauses to which we desire particularly to call attention. We believe that an examination of these clauses alone, giving due consideration to the various phrases and words used therein, will, independent of all other circumstances, more than justify the interpretation of the price adjustment placed upon it by the trial court.

At the outset we call attention to the phrase in the preliminary portion quoted "changes in labor and/or material costs." When we come to the portion of the clause expressly dealing with material we find the repeated use of the words "material" and "increases in material costs." The words "material" and "material costs" must have been intended to refer to the principal materials used in the manufacture of the cable. While the clause itself is not artfully drawn, its meaning is clear. The prefix "Group VI" which is a part of the phrase "Group VI—Metal and Metal Products," all of which is in quotations in the price adjustment clause itself, nowhere appears

in the United States Department of Labor compilations in connection with the Metal and Metal Products group of 141 separate commodities. Consequently, we are safe in saying that the term "Group VI—Metal and Metal Products" is not a term of art.

Next, it should be noted that before the quoted words "Group VI—Metal and Metal Products" the words "wholesale prices" appear, but there are *no* wholesale *prices* given for Metal and Metal Products as a group. Obviously no single price could be assigned to 141 different products, for no direct comparison can be made between lead and copper selling for a few cents a pound and automobiles, trucks, farm machinery and all of the various other items under the group.

The next sentence in the clause taken with the words "the average of the monthly *material* index figures" is wholly inconsistent with Metal and Metal Products as a group. The draftsman of the clause, if it was intended to refer to the group as a whole, would have referred back to the index numbers of Metal and Metal Products as a group and would not have referred to monthly *material* index figures since "material" can only refer to the material in the cable. This same use as we have stated of the words "material index figure," and "material index figure for the base month," can only reasonably refer to lead and copper, the principal (and only metallic) components of the cable. In the following clause (c) [T. of R. p. 34] the words "monthly material index figure" and "material index figure" are used several times without any reference whatsoever to Metal and Metal Products with or without the prefix "Group VI." Likewise, under the general provisions [Paragraph 1, T. of R. p. 34] we

find the words "material costs." A later provision of the price adjustment clause [T. of R. p. 35] provides that in determining the adjustment in contract price the percentage of increase or decrease in labor and *material costs* will be calculated to the nearest 1/10th of 1%. The requirement of such a high degree of accuracy would indeed be strange if thousands of dollars' costs with respect to material are to be added to or subtracted from the contract price merely because of the increase or decrease of index numbers relating to Metal and Metal Products as a group as distinct from the component parts of the material furnished under the contract. We cannot believe that the Appellants were entering into such a gambling contract.

Appellants concede in their Opening Brief, as they must concede, that it was impossible for the Department to buy material from anyone on a firm basis (App. Op. Br. p. 35, bottom of page). Appellants also state by way of excuse for their construction of the price adjustment clause that it was clear that the parties did not intend to achieve complete price adjustment (App. Op. Br. p. 38). And again with respect to their own contention Appellants' Opening Brief states:

> "The formula demonstrates in itself that it was not intended to accurately and fully adjust the price to all fluctuations of the market for either party." (App. Op. Br. p. 38.)

Appellants are bound to concede that they are obliged to give up prefix "Group VI" since no such prefix is assigned to Metal and Metal Products in the United States Department of Labor publications. Nevertheless appellants feel obliged to hold on to the word "Group" as well

as to translate a Roman VI into an Arabic 6 by an elaborate and, we think, fruitless argument under Section 4 of Appellants' Opening Brief, pages 25 to 34.

We wish to call the Court's attention to another very important later paragraph in the price adjustment clause which, we think, conclusively shows that Appellants' construction of the main price adjustment clause relating to materials is wholly unsound.

Clause (c) of the price adjustment clause provides:

> "If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the selection of substitute indices will be made by mutual agreement of the parties to this contract." [T. of R. p. 87.]

It is inconceivable that any other price data grouping 141 separate commodities under Metal and Metal Products group would be available if the United States Department of Labor publications were not continued. We think under those circumstances it would be impossible for the parties by mutual agreement to agree on any other data except that which referred to the increased or decreased costs of the principal *materials* in the cable. The prices of lead and copper would always be available. Lead and copper are probably the two most important metals, with the possible exception of iron, used in manufacturing. It must be apparent therefore that the Court's construction and application of the price adjustment clause was abundantly justified and we would say required by the internal evidence available from an examination of the price adjustment clause.

By specific agreement the clause provides for a separate adjustment with respect to increase or decrease in labor costs. If now, as Appellants contend, we are to go back to the average price translated into index numbers of 141 commodities or articles, 110 of which are strictly manufactured, we again throw labor back into the price adjustment clause with respect to materials. The parties by agreement having expressly taken it out, Appellants now wish by indirection and contrary to all reason to return it as a factor in determining increases or decreases in material costs.

We have pointed out that on Appellants' theory, Appellants would be obliged to pay out large additional amounts under the price adjustment clause if the index numbers of Metal and Metal Products as a group advanced, while lead and copper did not. Appellee (plaintiff below) in its pre-trial Points and Authorities, pursuant to local Rule 12, referred as an illustration to quicksilver listed close to lead and copper under the non-ferrous subgroup under Metal and Metal Products. Quicksilver carried a price in April (the base month of the contract) of $104.50 per 76 pound flask and steadily declined in price until December of that year the price was $88.37½ [see page 86 of Bulletin No. 920—upper half of the table —Pltf. Ex. 1]. If this contract, therefore, had specified a product largely composed of mercury the manufacturer's costs would have drastically decreased and yet—under Appellants' construction of the price adjustment clause—the manufacturer on a contract of the size of the one here involved could have collected in the neighborhood of $15,000 as additional compensation because of the advance in the Metal and Metal Products group as a whole.

It cannot be assumed that Appellants, the Department of Water and Power and the City of Los Angeles were

playing roulette with their funds, nor can it be assumed that a manufacturer who was refusing to make firm bids would, in turn, be willing to enter into such a speculative contract. It is readily seen, therefore, why the learned trial Judge felt that it was unrealistic to tie the price adjustment clause into and make it dependent upon the average of some 140 metal commodities. The only assumption possible in approaching an interpretation of this price adjustment clause is that it was for the legitimate purpose of fairly and with reasonable accuracy adjusting the contract price depending upon increases or decreases in the cost of materials contained in the cable.

We now come to Appellants' detailed argument with respect to whether Metal and Metal Products is Group 6 or Group 7 and its discussion of when a group is a group or a subgroup. This portion of Appellants' Opening Brief (pp. 25-34) is obviously an attempt to answer comments contained in the informal opinion of the learned trial Judge below.

The Findings and Judgment do not purport to determine whether Metal and Metal Products is the sixth group in the list or the seventh group, or is a main group or a sub-group, but an examination of the Bureau of Labor publications [Pltf. Ex. 1, Table I, p. 11] demonstrates that even in his offhand comments and in his discussion with Appellants' counsel at the trial that the Court and not Appellants' counsel was correct and that Metal and Metal Products is the seventh group. But the Findings and Judgment of the Court turned on no such narrow point. Appellants' Opening Brief (pp. 25-34) dealing with what is a group or a subgroup or whether "all commodities" was or was not a group seems to Appellee wholly immaterial and beside the point. As stated, "Group VI—Metal and Metal Products" was not a phrase

of art since the prefix "Group VI" does not appear in the Bureau of Labor Publications and, therefore, the trial court was obliged to interpret the price adjustment clause in such a way as he believed carried out the true intentions of the parties, giving proper consideration to the entire contract.

The entire controversy in the Court below was as to whether the price adjustment clause reasonably construed required a reference to the changes in material costs with respect to copper and lead or whether it required the taking of the average change in the index numbers relating solely to the entire group of Metal and Metal Products. We believe that the trial court's construction of this clause was the only one reasonably available considering the terms and provisions of the clause and the subject matter of the contract.

Beginning at pages 37-38 of Appellants' Opening Brief, Appellants mention what they term "arbitrary features" of the price adjustment clause which Appellants claim indicated the parties "did not intend to achieve complete price adjustment." We do not know why it should be assumed that the parties would not wish to achieve at least a reasonably accurate price adjustment. An examination of the eleven so-called "arbitrary features" give no weight to Appellants' argument. The requirement that deliveries comply with OPA prices was obviously to insure the legality of the delivery price. There is not the slightest evidence in the record that 20% agreed upon by the parties as representing labor and 50% as representing material in connection with the price adjustment was not accurate and reasonable. The remaining 30% would obviously cover costs, other than direct labor and material costs, including such items as overhead, capital in-

vestment and other matters which the parties were willing to assume would not greatly fluctuate during the life of the contract. There is nothing in the record with respect to the October, 1941, index numbers which were to be applied in computing decreases in the contract price. The provision that the total price increase should not exceed 30% of the original bid price is a usual and customary limitation upon price adjustment or escalator clauses and does not in the slightest indicate that reasonably accurate adjustments should not be made up to that percentage. The provision that the average monthly increases in labor costs and the average monthly increases in material costs be taken in place of taking the actual date of the payment of labor and material and the purchase of material was reasonably accurate. The saving in bookkeeping expense alone and a possible controversy over minor matters would more than justify such provisions. Lastly, Appellants state that since the percentage of increase or decrease was to be calculated to the nearest 1/10th of 1% it was an indication that the parties did not intend to achieve complete price adjustment. Not carrying the computation beyond 1/10th of 1% would at most, if the dropping of figures were all in error on one side, not exceed $1.00 in $1,000, and this can scarcely be used as an argument intended to justify an overpayment or underpayment of thousands of dollars which has no reference to actual increased or decreased costs of material.

We may also here state that the deduction of 21¢ (the difference between the amount prayed for in plaintiff's Complaint and the amount of the judgment) represented the only difference between plaintiffs calculation and the calculation made before the trial by *Appellants' own auditors,* presumably carried out to 1/10th of 1%.

3. United States Bureau of Labor Price Publications.

The Court found that a reasonable construction of the price adjustment clause required a reference to the increase in prices of lead and copper, two of the metals listed under Metal and Metal Products as shown in the Department of Labor monthly bulletins labeled "Average Wholesale Prices and Index Numbers of Individual Commodities."

In plaintiff's (Appellee here) pre-trial memorandum plaintiff went into a detailed analysis and explanation of the Bureau of Labor monthly publications referred to in the price adjustment clause [see T. of R. pp. 36-45]. This explanation attempted to show the way the publications were set up and how they dealt with individual commodity items, such as copper and lead, with their respective code numbers and the grouping of the individual commodities into various groups and sub-groups. If the explanation as set forth in Appellants' Opening Brief and as in Appellee's Reply Brief are not sufficient, we respectfully refer the Court to the Transcript of Record, pp. 36-45.

Appellants in their Opening Brief from pages 25 to 34 discuss and quote various portions of Bulletin No. 920 [Pltf. Ex. 1]. The portions quoted as well as additional matter referred to in the opening introductory clauses of said Bulletin show that the Bureau of Labor itself admits that the index numbers assigned to Metal and Metal Products as a group are subject to important inaccuracies due to the change in the method of handling automobiles which carried a heavy weight in computing the index numbers. Furthermore as the quotations and the Bulle-

tin show [see pp. 2 and 3 of Bulletin No. 920—Pltf. Ex. 1] quoted from T. of R. p. 56, the Bulletin states that 23 commodities are included in both the farm and food indices, and prices of 23 other commodities are included in both the Metal and Metal Products and building material groups. As elsewhere stated, the only *actual and accurate prices* given in the Bulletin are in respect to the individual commodities. Any grouping of these individual commodities can be made and is, of course, more or less arbitrary. Such grouping of these commodities, therefore, gives only statistical information with respect to the general increase in prices or decrease in prices on the average of all of the commodities under the particular group.

Out of the 141 individual commodities or articles listed under Metal and Metal Products, for which individual prices are given in the upper half of Table 12 (49) and index numbers in the lower half of Table 12, approximately 110 of these commodities or articles are manufactured. For example, all of the commodities listed under the agricultural implements and farm machinery, the first subdivision under Metal and Metal Products, are strictly manufactured articles. Of those listed under the second subdivision, iron and steel, about 44 are strictly manufactured articles or products. Under the third subdivision, motor vehicles, passenger cars and trucks are both manufactured articles. Under the non-ferrous metals group, 9 are manufactured articles and 11 are semi-manufactured articles. Copper and lead are classed as semi-manufactured articles. Under the final subdivision of plumbing and

heating, all 8 commodities are classed as manufactured articles. In the whole list of Metal and Metal Products, 3 commodities are listed as raw material. Totaling these figures it appears out of approximately 140 articles or products listed under Metal and Metal Products, 110 are manufactured articles, 27 are semi-manufactured and 3 are raw materials.

Thus it is seen that the individual commodities and their individual change in prices from month to month are (the) building blocks used in making up the various groups. There are no group prices given in the bulletins. Lead and copper could drop to one cent a pound and no appreciable effect would be evident in the index numbers of Metal and Metal Products as a group of 141 items. Even if Metal and Metal Products as a group was precisely accurate it would constitute no fair measure of changes in the cost of lead and copper. Hence, Appellants' argument is just as sensible as if we were to take the average height of 140 men, cut a suit of clothes to this measurement and then expect it to fit a short man or a tall man.

The more the said Bureau of Labor publications are studied, the more unreasonable appears Appellants' attempted construction of the price adjustment clause, and these publications alone, considered in the light of what was sought to be accomplished by the price adjustment clause, would amply sustain the Court's construction of that clause.

4. The Testimony of Appellants' Own Chief Witness With Respect to the Origin of the Price Adjustment Clause Here Involved Requires the Construction Placed on It by the Trial Court.

Even if all that we have heretofore said did not satisfy this Court that the trial court correctly construed the price adjustment clause, the testimony voluntarily put on by Appellants (defendants below) would, we believe, foreclose the question adverse to Appellants' position.

Counsel for *Appellants* called as their own witness, Mr. William R. Foster [T. of R. p. 135]. He had been employed by the Department of Water and Power of the City of Los Angeles a trifle over forty years and since 1941 as Purchasing Agent. He first became familiar with the price adjustment clause in 1941 when he was making a study of price adjustment clauses so that the Department could secure the necessary material; that he prepared a "rough draft" and discussed it with representatives of the various firms, including Okonite. On direct examination he testified:

> "What was your reason for considering the price adjustment clause at that time? A. Because it was impossible to buy material of any one on a firm price basis." [T. of R. p. 138.]

And on cross-examination by counsel for Appellee (plaintiff below):

> "Q. As I understand your testimony, you prepared this price adjustment clause, which you say was identical with this, and gave a copy to Mr. Kennedy? A. No. Just a rough draft." [T. of R. p. 139.]

On redirect examination, Mr. Foster testified:

"A. That clause was worked up primarily in the hopes that we would not have too many adjustment clauses, and we could use one adjustment for the material. It was picked because that group was used in a lot of materials and equipment that we purchased. It was thought it would save the necessity of having different types of adjustment. We changed our own adjustments. We changed first in the latter part of 1946. We renewed what we called the OPA price adjustment clause base in the Office of Price Administration." [T. of R. pp. 140-141.]

On recross examination, Mr. Foster testified:

"Q. How did you come to put in the escalator clause? A. There were two reasons. The first one was, to be able to do business, and second, the adjustment clause was a protection to the parties.

"Q. You were trying to work out a fair clause for the protection of both parties? A. Yes. The main thing, if prices went down we wanted it.

"The Court: You were buying a great variety of products? A. Yes.

"The Court: All sorts of electrical supplies? A. Yes.

"The Court. You were not interested so much in the general uptrend of prices as in the trend in things you wanted? A. That is correct.

"The Court: If the price of groceries had gone up 100 per cent, you didn't care; you were interested in the price of electrical products? A. The adjustment clause was to favor those particular commodities." (Emphasis added.) [T. of R. pp. 141-142.]

On redirect examination by Appellants' counsel, Mr. Foster testified:

> "Q. Why did you choose for the metal products Group VI? A. For the purpose of reducing to the lowest possible minimum the price adjustment clause we would have to use. There are a great many in that group, and we thought, to take a group of that kind, it would reduce a considerable number of price adjustment clauses, which we would have to have." (Emphasis added.) [T. of R. p. 142.]

When the witness said that that group was used in a lot of materials and equipment that he purchased he clearly meant that a lot of material and equipment which they purchased fell under that group. What possible inference can be drawn from this witness' testimony who drafted this clause when he states that the price adjustment was a protection to the parties and he was trying to work out a fair clause for the protection of both parties, and that if prices went down "we" wanted it, other than by a reference to the commodities which they were purchasing. The searching questions asked this witness by the Court and his answers thereto, which we have heretofore quoted, are only consistent with the conclusion that this group of Metal and Metal Products was selected as an *appropriate place* under which to find changes in price of a good many articles and commodities which the Department was purchasing. What possible other meaning can be assigned to his answer to the Court when he stated that the adjustment clause was "to favor those particular com-

modities?" *Here, of course, is the complete explanation as to why lead and copper would not be specifically mentioned in the price adjustment clause.* It was drawn as a general form clause and the specifications which later appear in the contract would cover the particular items and commodities with respect to which the Appellants were requesting bids. Seeing, we believe, the complete destruction of his theory by the testimony of his own witness, counsel for Appellants asked as a final leading question:

> "Q. Did you have in mind that the component figure for *many groups* was a more conservative figure on which to adjust the price? A. Yes.
>
> "Q. Rather than the individual commodity? A. Yes." (Emphasis supplied.) [T. of R. p. 142.]

The words "many groups" in the question make it confusing. A "yes" answer to such a leading question from his own counsel carries little weight, compared to the witness' detailed testimony. Certainly, at least, the Court, having heard the testimony of Mr. Foster, was entitled to weigh it and to accept such part of it as was convincing to the Court and to draw such reasonable inferences therefrom as the Court might feel proper as bearing upon the main question of the construction of the price adjustment clause which this witness prepared. *United States v. Yellow Cab Co.,* 70 S. Ct. 177 (Advance Sheets—Decided December 5, 1949), hereinafter cited and quoted from under heading VI of this brief.

V.

IT IS WELL SETTLED THAT IF ONE CONSTRUCTION OF A CONTRACT WOULD MAKE IT UNREASONABLE, UNFAIR OR UNUSUAL, AND ANOTHER CONSTRUCTION WOULD MAKE IT FAIR, REASONABLE AND JUST, THE LATTER CONSTRUCTION MUST BE ADOPTED.

The trial court's construction of the price adjustment clause was the only fair, reasonable and just one. But if it be assumed that Appellants' construction was possible, it would render the contract unusual, inaccurate, speculative and unfair, and all of the authorities forbid such a construction.

In *Cohn v. Cohn,* 20 Cal. 2d 65, 70; 123 P. 2d 833, 835-36, the Supreme Court of California stated:

> "Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and $94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of $650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respondent will receive 45 per cent of the amount 'available for distribution.' *Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted.*" (Emphasis added.)
>
> *Cohn v. Cohn,* 20 Cal. 2d 65, 70, 123 P. 2d 833, 835-36.

Caletti v. State (1941), 45 Cal. App. 2d 302, 305; 114 P. 2d 9, 10:

> "It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted. (Stein v. Archibald, 151 Cal. 220 (90 Pac. 536).) *It would seem that here the correction was properly called into use, for it cannot be assumed the contractor was agreeing to take less pay for material actually handled, or that the state was assuming to pay for more yardage than actually removed by the contractor.*" (Emphasis added.) [T. of R. pp. 62-63.]

The statement of the Court in the above case which we have emphasized is particularly appropriate to the case now before this Court.

Yeremian v. Turlock etc., Co., Inc., 30 Cal. App. 2d 92, 96; 85 P. 2d 515, 518:

> "A contract must receive such interpretation as will make it reasonable. (Civ. Code, Sec. 1643; 6 Cal. Jur., Contracts, Sec. 269, p. 271.) Here the interpretation urged by defendant would render the contract unreasonable and unfair, and its language does not require such interpretation." [T. of R. p. 62.]

In *Ohran v. National Automobile Insurance Co.,* 82 Cal. App. 2d 636; 187 P. 2d 66 (cited near the bottom of page 15 of Appellants' Opening Brief), the Court stated:

> "Although it seems doubtful whether the rule that ambiguous insurance policy provisions must be interpreted most strongly against the insurer (*Linnastruth v. Mutual Benefit H. & A. Assn.,* 22 Cal. 2d 216,

218 (137 P. 2d 833)) applies to provisions required to be inserted by statute or regulation (44 C. J. S. 1193) the general rule that where one construction would make a contract *unreasonable or unfair and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted* (*Cohn v. Cohn,* 20 Cal. 2d 65, 70 (123 P. 2d 833); *Stein v. Archibald,* 151 Cal. 220, 223 (90 P. 536)) will apply as well to the construction of compulsory provisions." (Emphasis added.)

Ohran v. National Automobile Insurance Co., 82 Cal. App. 2d 636, 648; 187 P. 2d 66, 73.

Champlin v. Commissioner of Internal Revenue, 71 F. 2d 23 (10th Cir. 1934):

"Nor is there anything to justify the suggestion that Mrs. Champlin was to lose if the wells were dry, but not to profit if they were producers. Such an arrangement ought not to be imputed if a more reasonable construction may be put upon their acts. In a series of cases, the Eighth and other circuits have steadfastly held to the rule clearly stated by Judge Walter H. Sanborn, that where an agreement is fairly susceptible of two constructions, that one will be preferred which is rational and probable, and such as prudent men would naturally execute. (Citing cases.)"

Champlin v. Commissioner of Internal Revenue, 71 F. 2d 23, 28 (10th Cir. 1934).

Bayne v. United States, 195 Fed. 236 (8th Cir. 1912):

"If the construction of the contract adopted by the trial court shall prevail, the plaintiffs will suffer an actual loss of $3,430.38. If this is the only possible

construction, they cannot complain; but if the contract, without doing violence to its terms, is capable of a different construction more in accordance with justice and fair dealing, then under a well-recognized rule of construction we should adopt the latter."

Bayne v. United States, 195 Fed. 236, 241 (8th Cir. 1912).

See, also, *Transport Oil Co. v. Exeter Oil Co.,* 84 Cal. App. 2d 616; 191 P. 2d 129, also cited at the bottom of page 15 of Appellants' Opening Brief, where the Court in construing an oil and gas lease states:

"* * * such leases are to be construed in accordance with their *reasonable and common sense meaning.* (Civ. Code, Sec. 1643; Irvine v. MacGregor, 203 Cal. 583 (265 P. 218).)" (Italics supplied.)

Transport Oil Co. v. Exeter Oil Co., 84 Cal. App. 2d 616, 621; 191 P. 2d 129, 132.

In *Moore v. Wood,* 26 Cal. 2d 621; 160 P. 2d 772, cited by Appellants in their Opening Brief at the top of page 15, the Court said:

"The meaning of a written instrument is not to be determined by isolating one term used by the parties and defining it without reference to other language of the contract. (*Skookum Oil Co. v. Thomas,* 162 Cal. 539, 547 [123 P. 363]; *Culley v. Cochran,* 17 Cal. App. 2d 498, 502 [62 P. 2d 168].) On the contrary, for the purpose of ascertaining the intention of the parties, their agreement must be construed as a whole, so that when read together all of its provisions may be given effect. (Civ. Code, Sec. 1641;

Universal Sales Corp. v. California etc. Mfg. Co., 20 Cal. 2d 751, 760 [128 P. 2d 665]; *Ghirardelli v. Peninsula Properties Co.,* 16 Cal. 2d 494, 496 [107 P. 2d 41].)"

Moore v. Wood, 26 Cal. 2d 621, 630; 160 P. 2d 772, 777.

See, also, the following pertinent sections of the *California Civil Code* relating to the construction of contracts:

Sec. 1641 provides:

"Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Sec. 1643 provides:

"Interpretation in favor of contract. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Sec. 1648 provides:

"Contract restricted to its evidence object. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."

Sec. 1636 provides:

"Contracts, how to be interpreted. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

VI.

THE FINDINGS OF THE TRIAL COURT ARE PRESUMPTIVELY CORRECT AND WILL NOT BE DISTURBED UNLESS THIS COURT REACHES A DEFINITE AND FIRM CONVICTION THAT THEY ARE CLEARLY ERRONEOUS.

Rule 52(a) of the Federal Rules of Civil Procedure, as Appellants correctly state (App. Op. Br. p. 13), prescribes that findings in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *United States v. United States Gypsum Co.* (Mar. 1948), 333 U. S. 364; 68 S. Ct. 525; 92 L. Ed. 746 (cited in App. Op. Br. p. 13), states that Rule 52(a) is a continuation of the prior Federal Equity Rule and does permit the Appellate Court to reverse the trial court where the decision of the trial court was clearly erroneous. The Supreme Court in discussing the phrase "clearly erroneous" in 52(a) of the Federal Rules of Civil Procedure states:

> "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."
>
> *United States v. United States Gypsum Co.,* 333 U. S. 364, 397; 68 S. Ct. 525; 92 L. Ed. 746, 766.

In addition to the foregoing, the Supreme Court makes this important statement:

> "In so far as this finding and others, to which we shall refer, *are inferences drawn from documents or*

undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure *is applicable.* That rule prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'" (Emphasis added.)

United States v. United States Gypsum Co., 333 U. S. 364, 395; 68 S. Ct. 525; 92 L. Ed. 746, 765.

A very recent United States Supreme Court case has again considered the effect of Rule 52(a) of the Federal Rules of Civil Procedure; has held that it applies to appeals by the Government, as well as to other litigants; that findings of the trial court even where there was a "choice between two permissible views" are not clearly erroneous.

United States v. Yellow Cab Co., 70 S. Ct. 177 (Advance Sheets—decided December 5, 1949, 94 L. Ed. 3). This was a suit in equity by the Government under the Sherman Act. The trial court found in favor of the defendant with respect to the charges of conspiracy. We quote pertinent provisions of the opinion of Justice Jackson (page citations are from Supreme Court Advance Sheets):

"What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own." (P. 178.)

* * * * * * * *

"The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others." (P. 179.)

* * * * * * * *

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

U. S. v. Yellow Cab Co., 70 S. Ct. 177, 179 (Advance Sheets—decided Dec. 5, 1949).

In the case of *Hart v. California Pacific Title & Trust Co.,* 136 F. 2d 430 (9th Cir., 1943), this Court (Ninth Circuit) had before it the question of the interpretation

of an option provision in a mining lease. After indicating that appellants' interpretation appears inadmissible, the Court said:

> "While the parties might well have employed language more clearly expressive of their intent, yet 'the construction given the instrument by the trial court appears to be consistent with the true intent of the parties, and, where that is the case, *the appellate court will not substitute another interpretation, though it seem equally tenable.*' Kautz v. Zurich Gen. Acc. & Liability Ins. Co., 212 Cal. 576, 582; 300 P. 34, 37." (Emphasis added.)
>
> *Hart v. California Pacific Title & Trust Co.,* 136 F. 2d 430, 432 (9th Cir., 1943).

In *Adams v. Petroleum Midway Co., Ltd.,* 205 Cal. 221; 270 Pac. 668, the question before the Court was the interpretation of a clause in an oil lease.

> "If it should be conceded that the provision of the lease is sufficiently uncertain to admit of the meaning which appellant gives it, it certainly cannot be said that the agreement, considered in the light of the facts stipulated to, is not susceptible of the interpretation placed upon it by the court. Hence we cannot disturb the decision. *It was the province of the trial court to resolve doubtful language in the lease.* We are further of the opinion that the construction placed upon the provisions of the lease by the trial court is more reasonable than the interpretation sought by appellant." (Emphasis added.)
>
> *Adams v. Petroleum Midway Co., Ltd.,* 205 Cal. 221, 224; 270 Pac. 668, 669.

See, also, to the same effect:

Kautz v. Zurich Gen. A. & L. Ins. Co., 212 Cal. 576, 584; 300 Pac. 34, 37;

Manley v. Pacific Mill & Timber Co., 79 Cal. App. 641, 648; 250 Pac. 710, 713 (1926);

Riccomini v. Riccomini, 77 Cal. App. 2d 850, 853; 176 P. 2d 750, 752 (1947);

Baird v. Lindblad, 75 Cal. App. 2d 202, 204-205; 170 P. 2d 488, 489 (1946);

Maguire v. Lees, 74 Cal. App. 2d 697, 704; 169 P. 2d 411, 414-415 (1946);

Neff v. Mutual Life Ins. Co., 48 Cal. App. 2d 110, 112-113; 119 P. 2d 404, 406 (1941).

It was clearly within the province of the trial court to draw all reasonable inferences that it thought proper from the price adjustment clause as well as all reasonable inferences from the testimony of the witnesses, and unless the trial court was clearly in error in those respects, its judgment is not to be disturbed on appeal.

VII.

THE CONTENTIONS OF APPELLANTS THAT THE TRIAL COURT ERRED IN (1) ADMITTING THE TESTIMONY OF WITNESS METZ; (2) IN NOT ACCURATELY COMPUTING THE PRINCIPAL AMOUNT OF THE JUDGMENT; (3) IN NOT GIVING SUFFICIENT WEIGHT TO CERTAIN INVOICES, ARE ALL WITHOUT MERIT.

(1) Testimony of Witness Metz.

Specification of error No. 4 (Appellants' Opening Brief p. 6) alleges error in admitting certain testimony given by Mr. Metz, witness for plaintiff below. Over Appellants' objection, Mr. Metz testified that the cost of copper and lead in the cable on the average was 90% of the cost of all material in the cable [T. of R. p. 110]. The Court later on its own motion asked about the insulating material in the cable and *Appellants'* counsel answered this question [T. of R. p. 120]. The cable was before the Court as an exhibit and the Court was entitled to have any pertinent information relating to the problem presented to it. The Complaint alleged [par. IX, T. of R. bottom of p. 5] that "the two principal materials used in the manufacture of said cable were copper and lead * * *." The Answer [par. IV, T. of R. bottom of p. 15] admitted "that lead and copper constitute a large proportion of the materials used in the manufacture of said cable." Consequently it was certainly material to show the average cost of the copper and lead in the cable compared to the other insulating material. While Appellants criticize this

ruling of the Court, nevertheless Appellants put in the detailed costs of copper and lead with respect to each different item of the cable by testimony and exhibits obviously prepared in advance of the trial. This specification of error and Appellants' argument in support of it is groundless.

Similar objections were made to testimony by Mr. Metz that his Company did not have on hand a sufficient quantity of copper and lead to cover the contract. The Court felt that this was information pertinent to the case [T. of R. p. 110].

Another specification is with respect to the testimony of Mr. Metz that the copper and lead in the cable actually cost about $24,000 over the April prices of such cable. Since the price adjustment clause expressly provided that the contract price shall be subject to adjustment "for changes in labor and/or material costs" it seemed at least *prima facie* incumbent upon the plaintiff to show increased costs had been incurred in order to make the price adjustment clause come into operation. As the record shows, when a motion later was made to strike this testimony, the Court allowed it to stand "not as an indication of damages" but in order to show that there was a substantial fluctuation in prices and whether it was great or small was not material. The Court's comment on this matter is set out in Appellants' Opening Brief at the top of page 10:

> "I think I will allow it to stand, to show that it was substantial."

The rulings of the Court with respect to this evidence and the refusal of the Court to strike the same under the conditions set forth in the record were clearly proper. The testimony dealt with operating conditions which the trial court was entitled to know as a part of the problem before it and virtually all of the matters that Mr. Metz testified to were greatly elaborated on by detailed testimony by Appellants' own witnesses [see testimony of witness, Boris A. Gray, T. of R. pp. 146-149].

Nor have Appellants indicated any adverse effect of any of the trial court's rulings.

The *Federal Rules of Civil Procedure* allow great liberality in the admission of evidence by the trial court. (Rule 43(a).)

Rule 61 of the Federal Rules of Civil Procedure provides:

> "Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

(2) Computation in Determining the Principal Amount of the Judgment.

The very language of the price adjustment clause itself justified the Court in accepting the method of computation reached in arriving at the amount of the judgment below. The price adjustment clause states:

> "The *average* of the monthly *material index figures* for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly *material index figure* with the *material index figure* for the Base Month." (Emphasis added.) [T. of R. p. 13.]

The Court will note that the language used includes the word "average" and the words "monthly material index figures." This language is appropriate and may reasonably be interpreted to include the average of the copper and lead figures as well as using such average in computing the percentage of increase in addition to the average over the months in question. That this was the interpretation of Appellants at the time of filing their Answer is abundantly clear from the manner in which index numbers of lead and copper were averaged to obtain the percentage increase in the table set out in Paragraph IX of defendants' Answer [T. of R. p. 18].

The question of method of computation was never in issue [Defendants' Answer, T. of R. p. 18]. It was at all times conceded by defendants that if the lead and cop-

per figures were to be used, the plaintiff was entitled to recover $9,996.69. The trial court was so told during the trial. No accounting testimony was given by either party. All of the necessary data is in the Transcript of Record. Appellants repeatedly stated that the "mathematics" of the computation was correct if plaintiff's (Appellee's) construction of the price adjustment clause was adopted by the Court. Appellants' only argument was for their construction of the price adjustment clause. The Court will note that while Appellants' counsel called witnesses and introduced charts dealing with the cost of copper and lead in the cable he was careful not to ask his own witnesses what the result would be of making the computation separately with respect to lead and copper and separately with respect to each item of cable and the cost of copper and lead therein. Nor do Appellants anywhere in their Opening Brief attempt to show how the computation which was actually made by the Court was detrimental to Appellants.

Some simple arithmetic demonstrates that a computation taking the index numbers of lead and copper separately would only result in increasing the principal amount of the Judgment. The percentage of increase in the lead figures [T. of R. p. 18] down to the first delivery date of October is approximately 21%. The percentage of increase of the copper figures down to the same date is approximately 14%. Appellants state in their Opening Brief that the cost of lead required for the contract was almost twice the cost of the copper required ($25,034 for

the lead as against $12,975 for copper). Assuming a ratio of costs of 2 to 1 and taking for simplicity of computation the cost of $200 for lead and $100 for copper—21% of $200 is $42.00 and 14% of $100.00 is $14.00, making a total of $56.00. On the other hand, using these same figures but taking the average increase of lead and copper together we have 21% plus 14% equals 35%, ½ of which is 17.5%; $100.00 cost of copper and $200.00 cost of lead equals $300.00, the cost of both; 17.5% of $300.00 is $52.50, a difference of $3.50. Since $300.00 is only a small portion of 50% of the contract price it is immediately apparent that making a separate computation with respect to lead and copper would increase the principal amount of the Judgment by many hundreds of dollars.

(3) Invoices.

Under Point 7 (Appellants' Opening Brief p. 44) Appellants argue that assuming the contract is ambiguous that certain invoices sent by Appellee to the Appellants were entitled to great weight with respect to the construction of the price adjustment clause. Appellants insisted throughout the trial court and also here that the contract is unambiguous. Now it is assumed to be ambiguous for the purpose of saying that the court should have given great weight to certain invoices. But, of course, the weight to be given to any evidence was entirely within the province of the court.

The price adjustment clause expressly provided that the adjustment for increased costs of materials was to take place at the end of the contract, yet these invoices were sent from the San Francisco office of the Appellee long before the termination of the contract. The invoices covered only a few months and were not computed in accordance with the terms of the contract as to delivery dates.

Mr. Metz (plaintiff's witness) testified that he first saw or heard of these invoices in April, 1947; that this was after all of the shipments had been made; that he then caused to be prepared a final invoice dated September 29, 1947, which was prepared under his supervision, after hearing of the prior invoices; that he knew there was a price adjustment clause in the contract to be carried out at the end of the contract [T. of R. pp. 130-132]. This complete explanation of these erroneous interim invoices was entitled to be considered by the trial court in weighing their materiality and evidentiary value. A mere invoice clerk mailing a few erroneous invoices for amounts *not yet due, unknown to the officers in charge of the contract,* is entitled to little weight. The trial court having permitted the introduction of these invoices, having considered the same and weighed them with the other evidence in the case, properly foreclosed this point adversely to Appellants.

VIII.

THE JUDGMENT PROPERLY INCLUDED INTEREST. APPELLANTS WERE ACTING IN THEIR PRIVATE OR PROPRIETARY CAPACITY AND NOT IN THEIR GOVERNMENTAL CAPACITY AND CONSEQUENTLY WERE SUBJECT TO ALL OF THE OBLIGATIONS OF SUCH A PRIVATE CORPORATION, INCLUDING LIABILITY FOR INTEREST FOR NON-PERFORMANCE OF THEIR CONTRACTS.

Under heading 8 of Appellants' Opening Brief at page 46 the contention is made for the first time on appeal that it was error to include interest from the time the money became due until the entry of judgment. Appellants will concede that this question of interest was not raised in the trial court at any stage of the proceedings. Under well settled rules, this Court could disregard it. However, Appellee does not wish to retain any portion of the judgment to which it is not justly entitled, for which reason we join with Appellants in requesting the Court to consider the question of interest and to pass on it upon its merits.

We are satisfied that interest was properly allowed by the court below and that the authorities cited by Appellants (App. Op. Br. pp. 46-48) have no application whatsoever to the case now before this Court. In the first place, in each of the cases cited by Appellants and the supporting authorities contained therein, the political subdivisions there involved were acting strictly in their governmental or sovereign capacities as distinct from their private or proprietary capacities.

It has always been the law of the State of California that when the State or a municipality engages in activities which are proprietary in character it becomes subject to all of the obligations of a private individual or a private corporation and the ancient theory that "a king can do no wrong," ceases to exist. It is well settled that the Department of Water and Power of the City of Los Angeles in carrying on its activities acts in a private or proprietary capacity.

See, *Douglass v. City of Los Angeles,* 5 Cal. 2d 123, 134; 53 P. 2d 353, wherein it is stated:

> "The department of water and power is conducted by the city in its proprietary capacity. This department has control of its own revenues and disbursements and in the ordinary course of its management would not be dependent on the city council for an appropriation to meet a demand for damages for the negligence of its officers or employees. The liability of the city for such negligence, through the operations of such a department, was established long before the enactment of the statute of 1923. (*Davoust v. City of Alameda,* 149 Cal. 69 (84 Pac. 760, 9 Ann. Cas. 847), 5 L. R. A. (N. S.) 536).)"
>
> *Douglass v. City of Los Angeles,* 5 Cal. 2d 123, 134; 53 P. 2d 353.

See, also, to the same effect:

> *Peccolo v. City of Los Angeles,* 8 Cal. 2d 532, 536; 66 P. 2d 651.

Chafor v. City of Long Beach, 174 Cal. 478; 163 Pac. 670, is a leading case dealing with the liability of a city for negligence while acting in its proprietary capacity. This case discusses at length the origin of the rule of sovereign

immunity and its modification in cases where the sovereign engages in private or proprietary activities and states that while acting in the latter capacity its contracts and obligations are to be regarded as those of a private corporation.

A short statement of the rule is contained in the case of *Davoust v. City of Alameda,* 149 Cal. 69; 84 Pac. 760:

> "Such a corporation, however, has a double character—governmental, and also proprietary and private —and *when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons* or private corporations. And while we have been referred to no case in this state where the proposition last stated was directly involved, yet in all *the cases from this state cited by respondent the acts complained of were connected with the exercise of what has uniformly been held to be* governmental functions, such as maintenance of public streets and roads, protection from fire, etc. However, the distinction has been frequently recognized and stated in the California decisions." (Emphasis added.)
>
> *Davoust v. City of Alameda,* 149 Cal. 69, 70; 84 Pac. 760, 761.

An excellent statement of the principle also appears in the case of *Brown v. Town of Sebastopol,* 153 Cal. 704; 96 Pac. 363, which is as follows:

> "It is well settled that the contract of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality. Says Bigelow on

Estoppel (sec. 1128): 'But it is a well-settled principle, applicable alike to the states and the United States, that whenever a government descends from the plains of sovereignty and contracts with parties, such government is regarded as a private person itself, and is bound accordingly. A state in its contracts with individuals must be judged and must abide by the same rules which govern individuals in similar cases, and when such a contract comes before a court the rights and obligations of the contracting parties will be adjudged upon the same principles as if both contracting parties were private persons.' "

Brown v. Town of Sebastopol, 153 Cal. 704, 709.

18 *Cal. Jur.* par. 279, p. 1000, states the rule as follows:

"It is settled that contracts with municipal corporations, when exercising other than governmental functions and within the limit of charter powers are construed by the same laws that govern the contracts of private individuals."

See, also, to the same effect:

Morrison v. Smith Bros., 211 Cal. 36; 293 Pac. 53;

Yolo v. Modesto Irrigation Dist., 216 Cal. 274; 13 P. 2d 908;

Corporation of America v. Durham Mutual Water Company, Ltd., 50 Cal. App. 2d 337;

People v. Superior Court, 29 Cal. 2d 754.

In the case of *Village of Oshkosh v. Fairbanks, Morse & Co.* (C. C. A. 8, 1925), 8 F. 2d 329, the Eighth Circuit stated the principle as follows:

"In constructing these plants the village acted in its purely private business capacity to supply itself and its inhabitants with light and water, and its meas-

ure of liability is the same as that of a private individual or corporation under like circumstances."

Village of Oshkosh v. Fairbanks, Morse & Co. (C. C. A. 8, 1925), 8 F. 2d 329, 330-331.

1 *McQuillan on Municipal Corporations,* par. 143, p. 432, announces the same principle.

"And whatever its origin, the municipal corporation in many of its most important aspects is treated as a private corporation, and is, therefore, *in this respect subject to all of the obligations,* and is entitled to all of the benefits of private laws." (Emphasis added.)

1 McQuillan on Municipal Corporations, par. 143, p. 432.

With respect to the question of interest *Sutherland on Damages,* par. 332, p. 1046, states:

"Any other rule is *fraught with injustice and if once established would exclude men of scanty means from taking such contracts, as the delay in payment and loss of the use of the money might, and in many cases would, cause a serious loss which, to one not possessed of ample means, could result in bankruptcy.* In its business transactions a city should be required to conform to the ordinary rules and all exemptions claimed which would work injustice should be denied." (Emphasis added.)

Sutherland on Damages, par. 332, p. 1046.

The cases cited by Appellants which hold that the State or a municipality is not liable for interest deal only as we have stated with activities in their governmental capacity, but even in such governmental or sovereign activities the Legislature has completely changed the rule with respect to the allowance of interest.

Section 16051 of the *Government Code of the State of California* (added by Stats. 1945, ch. 119, Sec. 2) in a chapter dealing with actions against the State of California provides as follows:

> "Amount of judgment. If judgment is rendered for the plaintiff, it shall be for the legal amount actually found due from the State to the plaintiff, *with legal interest from the time the claim or obligation first arose or accrued,* and without costs. (Added by Stats. 1945, ch. 119, Sec. 2." (Emphasis added.)
>
> Sec. 16051 Government Code of the State of California.

It is thus seen that even as to strictly governmental activities the Legislature has abrogated, with respect to the question of interest, the rule announced in the cases cited by Appellants in their Opening Brief and if those very cases were today before the California courts, in view of the statutory provision above quoted, the allowance of legal interest from the time the claim or obligation first arose or accrued would have been proper. What Appellants in their Opening Brief refer to as "public policy" (App. Op. Br. p. 47) has ceased to exist even in the gov-

ernmental activities of the State and its subdivisions. They are no longer "presumed to be always ready to pay" what they owe and the entire basis of Appellants' argument relating to interest disappears.

A diligent search has disclosed no case in California or elsewhere where any court has held that a municipality is not liable for interest upon its obligations where acting in its private or proprietary capacity. Neither reason nor authority supports Appellants' contention that the trial court erred in allowing interest upon the amount found due in this case. Appellants' contention with respect to this interest question is wholly erroneous and without merit and we respectfully request that this Court announce the true rule governing this question and that Appellants request that the interest item be stricken from the Findings and Judgment be denied.

CONCLUSION.

From a consideration of the subject matter of the contract, electrical cable, principally composed of lead and copper, its only metallic components; from an analysis of the terms and provisions of the price adjustment clause expressly referring to the materials used in the construction of the cable; from a consideration of the United States Bureau of Labor Statistics referred to in the price adjustment clause and in view of the testimony of Mr. Foster, Appellants' own chief witness, it conclusively appears that the construction placed upon the price adjustment clause by the trial court was proper. This construction rendered the contract fair, just and reasonable. The construction contended for by Appellants would render the contract unreasonable, inaccurate, speculative and unfair.

The allowance of interest was proper since the Department of Water and Power of the City of Los Angeles was acting in a private or proprietary capacity and its obligations, therefore, are those of any private individual or private corporation.

It is respectfully submitted that the judgment of the trial court should in all particulars be affirmed.

Respectfully submitted,

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